

What happens when your relationship ends?

**Answers to questions about your
family, your children and your property.**



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Introduction

Family law is the area of law that deals with particular family matters like divorce, your children and your property. Most family law issues in Australia are covered by the *Family Law Act*. If you are married or in a de facto relationship, the *Family Law Act* will cover any disagreements you might have about your children and/or property. Even if you are not married or in a de facto relationship, the *Family Law Act* still covers any disagreements you have about the children of your relationship, for example where they will live.

This brochure has been published by Legal Aid NSW. Legal Aid NSW is an independent government funded agency which provides legal representation to people who cannot afford a lawyer and who qualify for legal aid. Legal Aid NSW also provides free advice to the public, a duty solicitor at the Family Courts, and a lawyer assisted family dispute resolution service.

This brochure is intended as a guide to the law and is not a substitute for legal advice. If you are likely to be involved in court proceedings or legal action, you should get advice from a lawyer. Legal Aid NSW disclaims all liability for errors or omissions of any kind, or for any loss or damage, in whole or in part, arising from any person relying on any information in this brochure.

Children

We have just separated and disagree about arrangements for the children. What should we do?

Try dispute resolution.

Before you go to court about your children, you must:

- make a genuine effort to resolve the dispute through counselling or mediation; and
- make reasonable efforts to communicate with the other party.

There are many services that help with counselling and family dispute resolution including Legal Aid NSW, the Family Relationship Advice Line and the Family Relationship Centres. See the contact section at the back of this brochure.



Do I have to attend family dispute resolution before I go to court about my children?

Family dispute resolution (also known as mediation) is required before you can start court proceedings about children, unless your case is urgent or involves some exceptional factors such as family violence. The Court usually requires a certificate from a family dispute resolution practitioner before a case about children can go ahead.

What sort of agreements can we make about arrangements for the children?

You don't have to get formal court orders made about the arrangements for the children - you can organise informal agreements. Many separated parents have informal agreements in place about the parenting of their children.

Agreement is usually reached through negotiation between the parents with or without the help of mediation or counselling services. Neither parent can make the other stick to an informal agreement.

It will often be important to get some legal advice because the agreements you make about where children live and where they spend their time can also affect your property matters and child support.

Parenting Plans – Parents are able to enter into agreements about the arrangements for their children, known as parenting plans. A lawyer, family counsellor, family dispute resolution practitioner or family consultant (“an adviser”) can help you and your ex make a parenting plan.

A parenting plan must be in writing, signed and dated. It can be changed by another signed written agreement. Parenting plans create no legal obligations on either parent. However, the Court can consider what has been agreed in a parenting plan if you have later court proceedings dealing with parenting issues.

Consent Orders – This is an agreement which can be made after negotiating with the other parent, usually with the help of a lawyer or dispute resolution service. A consent order is filed at, and approved by the Courts and is binding because the Courts can be asked to enforce it.

Which courts decide parenting matters?

Family law matters in NSW are dealt with in the Family Courts and the Local Court. In many cases you may file your matter at the Local Court and it will be transferred to the Family Courts. More complex matters are likely to be decided in the Family Courts. Family Courts have procedures that aim to be more responsive to the needs of children.

What is a parenting order and what does the Court consider when it makes a parenting order?

The Courts decide what parenting orders to make for a child on the basis of the best interests of that child. The law says that in determining the best interests of a child, the Court's primary considerations must be:

- the benefit to the child of having a meaningful relationship with both of the child's parents; and
- the need to protect the child from physical or psychological harm, and from being subjected to, or exposed to, abuse, neglect or family violence.

Additional considerations include:

- any views expressed by the child, taking into account the child's maturity;
- the child's relationship with each parent and with any other person who is important (eg grandparents, siblings);
- the effect on the child of any change in arrangements for the child, including separating siblings from each other;
- the capacity of each parent to provide for the needs of the child; and
- the willingness and ability of a child's parents to encourage a close and continuing relationship with the other parent.

The parenting order that the Court makes will cover issues like:

- who a child will live with;
- what time a child will spend with a parent or other persons important to the child;

- how parental responsibility will be shared;
- how parents will communicate about a child; and
- how any disputes about what is set out in the orders will be resolved.

Parental responsibility means the duties parents have to their children and the important decisions parents make about their children. Each parent has equal shared parental responsibility for a child unless the Court makes an order changing this.

The Court presumes that parents will have equal shared parental responsibility, unless there has been abuse of a child, family violence, or it is not in the child's best interests.

This means that the parents need to consult each other about the major long term issues affecting a child, such as education, religion, health, the child's name and changes to the living arrangements of a child that would make it much more difficult for the child to spend time with the other parent.

When an order is made for equal shared parental responsibility, the Court will also consider whether it would be in the child's best interests or practical for the child to spend either equal time with each of the parents, or substantial and significant time with each parent.

The Court will take into account how far apart the parents live, the effect on the child of any proposed arrangements, and whether the parents can co-operate with each other.

Can court orders help grandparents see their grandchildren?

Grandparents (or anyone who has and wants to continue an ongoing relationship with the children) can apply for an order to spend time with them. Children have a right to spend time on a regular basis with their parents and other significant people in their lives unless it is not in their best interests.

Grandparents must therefore show that an order to spend time with the children is in the best interests of the children. Grandparents may need to attend family dispute resolution before they can apply to the Court.

Can children make their own decision about where they want to live?

The Court has the power to make orders about where children live and the time they spend with each parent for children under the age of 18. There is no age under 18 when the Court will listen only to the child's views. The Court must consider each child's views, but the importance placed on those views will depend on each child's maturity and level of understanding. Older children's views may be considered particularly significant by the Court.

What is an Independent Children's Lawyer?

Sometimes the Court may request that an independent children's lawyer be appointed to form an independent view of the evidence and act in the best interests of the child. This lawyer may interview the child without the parents being present, contact schools and health professionals of the child or parents and make sure certain documents and reports are provided to the Court. They may ask for a court expert to be appointed if they believe it is necessary to assist the Court reach a decision about with whom the children should live and spend time with.

Can I change my child's surname?

To formally change a child's name, you must apply to the NSW Registry of Births, Deaths and Marriages for registration of a name change. Children aged 12 years and over must consent to their change of name.

The consent of both parents is required or if this is not possible, a court order. Either parent can apply to the Court for an order seeking permission to change the name (if the other parent won't agree) or to stop (restrain) a parent from using a different name for a child.

The Court will make its decision based on what is in the best interests of the child. For example, the Court may look at the embarrassment a child may suffer because they have a different name from the parent they live with; or the possibility of the child being confused by the name change. However the Court rarely authorises a name change where both parents have a relationship with the child.

A child cannot change their name on their birth certificate themselves until they are 18 years old in NSW.

How do I get a passport for my children?

Unless exceptional circumstances exist, both parents' consent is required to obtain a passport for your children. If one parent refuses to consent, then you will need to obtain orders from the Court for a passport to be issued, and permitting the children to travel without the consent of the other parent.

If you take the children out of Australia without permission and there are court proceedings or orders, you could be committing a criminal offence.

Regardless of whether any court orders are in place, Australia has an agreement with many countries (the Hague Convention) which requires these countries to send the children back.

I have an order for the children to spend time with me but my ex-partner won't let me see them. What can I do?

If the other parent is in breach of an order affecting your children, you can either:

- try to resolve the conflict through counselling or mediation services (see back of this brochure); OR
- you can apply to the Court alleging the other party has contravened (broken) the parenting order.

The Court takes breaches of its orders very seriously. Depending on the circumstances, the non-complying parent can be referred to a parenting program, fined, made to provide compensatory (or "catch up" time) with the child and parent, or even face gaol. When a breach occurs, the non-complying parent may show a reasonable excuse. For example, a very sick child (supported by proper medical evidence) may be considered a legitimate reason for a parent breaching an order.

If the orders breached are no longer workable, the Court may order that both parents attend a parenting program, or adjourn the case to consider varying the orders.

Moving

The children have been living with me since separation and I want to move out of the local area. Can I just go with the children or do I need the other parent's permission?

The *Family Law Act* states that children have a right to know and to be cared for by both parents. However when a parent needs to move away and that move may affect the children's ability to spend time with and communicate with the other parent on a regular basis, a number of factors need to be considered:

1. When there are court orders about the child

You will need to look at the court order to see whether the move will breach the order. For example, if the order says your children are to spend time each weekend with the other parent and you plan to move from Sydney to the Gold Coast, you would probably be in breach if you moved. You would then need to have the orders varied either with the other parent's consent or by the Court before you move.

2. When there are no court orders about the child

You will not be breaching any orders by moving. However, if there is an informal agreement or parenting plan for your children to spend time with the other parent, then the other parent can ask the Court for an order which stops you from leaving the area with the children. Above all, the Court will look at what is in the best interests of the child.

The other parent has taken the children and is refusing to return them. What should I do?

If you have an order that the children live with you or spend time with you and the children have been taken or not returned, you need to apply to the Court for a recovery order. This order allows the police (both state and federal) to find and return your children to you.

If you do not have an order that the children live with or spend time with you, you need to apply to the Court for such an order, as well as a recovery order. This can be done simultaneously.

Sometimes in an emergency the Court may give these orders *ex parte*, that is without the other parent being at court. If you are worried that the children might be taken out of Australia you should put the children's names on the Airport Watch List. You will need to apply to the Court to place the children on the Watch List and send a copy of the application and any court orders made to the Federal Police.

If you find yourself in this situation you should phone the Federal Police (see inside back cover) and find out what they require.



Separation and divorce

How do I get a divorce?

When you first separate, there is nothing that you need to do and no document you need to sign to confirm that you are separated.

Divorces are a formal end to a marriage. After you have been separated for at least 12 months you can file for divorce. You will need to file your Application for Divorce at the Family Law Courts Registry.

It is possible to obtain a divorce even if you and your spouse lived in the same home during a part or all of the 12-month separation period. You will need to provide extra information and documentation to the Court. You should obtain legal advice from Legal Aid NSW, a community legal centre or LawAccess NSW.

You can NOT apply to the Court for a divorce (decree of dissolution of marriage) unless you have been separated for at least 12 months before the application is filed. However you CAN start negotiations about property (and children) as soon as the marriage has broken down. Many matters are resolved before the divorce application is filed.

You can obtain a Divorce Kit by contacting the Family Law Courts (contact details on back cover). A divorce will only legally end your marriage. It will not resolve issues in relation to the children or how your property will be divided.

If you get divorced before you and your ex-partner have settled your property, you must start property and/or spouse maintenance proceedings within 12 months of getting divorced.

Legal Aid NSW presents free divorce classes in a number of Sydney metropolitan and regional centres. Contact LawAccess NSW on 1300 888 529 for details or visit our website: www.legalaid.nsw.gov.au

I want to end my relationship but my ex-partner won't move out of the house that we own. What can I do?

Both you and your spouse or ex-partner are entitled to live in your home after separation regardless of whose name is on the rental agreement or the title of the property.

You cannot be forced to leave just because the property is not in your name, unless the Court orders it. See below for more information about family law property orders.

If you have to move out, it will not affect your entitlement to a share of the property. Any rights you have built up during the relationship will remain even if you leave. If you fear violence, you should seek advice immediately (see the contacts at the back of this brochure).

Sometimes one party can obtain a sole occupancy order requiring the other party to leave the home. The Court can make what is called an exclusive occupancy order of the house for either spouse. That means you can live in the house, without your spouse living there until the property has been divided. When the Court makes this kind of order, it will look at the needs of the parties and the children. This will usually only be made in exceptional situations where there is domestic violence or threats are being made by one spouse against the other, especially if the children are affected, or the house has been adjusted because somebody has a disability.

Property

How do we settle our property?

The same laws about property apply whether or not you were married, or in a de facto relationship (whether with a partner of the opposite sex or the same- sex). You can start negotiations about property as soon as the marriage or relationship has broken down.

If you get divorced you must start property or spouse maintenance proceedings within 12 months of your divorce becoming final. If you have been in a de facto relationship, you must commence property or maintenance proceedings within two years of your separation.

De facto relationships

If you are in a de facto relationship you can make an application for a property settlement under the *Family Law Act* if any one or more of the following conditions apply:

- your de facto relationship lasted for at least 2 years;
- you have a child with your de facto partner; and/or
- you have made a substantial contribution to the property or finances of your partner.

If there is a dispute about whether you were in a de facto relationship, the Court will look at things such as the length of the relationship, your living arrangements, arrangements of finances and property ownership, whether there was a sexual relationship, whether or not you had or cared for children and the way you presented your relationship in public.

We are now separated. How do we divide our assets?

Property includes all things owned by either one or both partners (in joint or sole names) including:

- cash and investments;
- real estate as well as personal property (e.g. cars, furniture);
- property owned before the marriage;
- gifts, inheritances, lottery wins received by one partner or spouse;
- redundancy payouts.

What about superannuation?

Superannuation will be relevant to any property settlement. It can be treated as property and can be split between married or de facto couples after they separate. How superannuation entitlements will be split depends on a variety of matters, including the type of superannuation scheme to which that person belongs. You should consult a lawyer if superannuation is an issue in your matter.

How does the Court divide our property?

There is no formula or rule that determines how the property will be divided. The Court is not required to split the property 50/50. It will consider many things, including,

- Property owned before the marriage or relationship: The extent to which this is considered the property of an individual partner will depend on the length of the marriage or relationship and what contributions the other partner made (if any) towards the accumulation and upkeep of property.
- Contributions made by both partners during the marriage or relationship: This includes direct contributions (e.g. wage earnings, maintaining assets and property), indirect contributions (e.g. gifts, assistance from family members), non-financial contributions, do-it-yourself home renovations and contributions made to the welfare of the family as a caregiver or homemaker.
- Future needs (e.g. whether one partner will be supporting a child, the age and health of each partner and their ability to obtain employment and earn income).

Generally, contributions to the welfare of the family would be considered to be just as important as the contribution of the primary wage earner.

It is a good idea to get a lawyer for your property settlement even if only for legal advice and help making consent orders. Otherwise, even if you have settled up in accordance with an informal agreement, there is nothing to stop the other party taking you to court to get more. If you have court orders, you will be exempt from paying stamp duty on many property transfers.

Child support

Child support and child maintenance – what are these?

Any parent knows that it costs a lot to look after children. Of course, this does not change when children's parents separate. Parents need to work out how they will continue to pay for their children's food, housing, clothes, school costs and other activities and expenses after separation. The money, or in kind payments, paid by one parent to the other (or to someone else if the children do not live with a parent) is called child support or child maintenance. Sometimes one parent makes these payments to the other even if the children are living part of the time with the paying parent.

Child support may apply to all parents whether married, in a de facto relationship, never lived together, never had a relationship, and also may include same-sex parents.

The Child Support Agency (CSA), which is the Commonwealth government agency that looks after child support payments, uses a mathematical formula to work out how much child support should be paid.

The end result is a child support assessment. The child support assessment takes into account factors such as the number of children involved, the age of the children, the parents' income and the level of care each parent provides for the children.

Once a child support assessment is made by the CSA, parents are free to arrange private payment of this sum. The person entitled to receive the child support payments can also ask the CSA to collect these payments on their behalf. It is a good idea to have the CSA collect if a parent/carer believes the other parent will not pay.

Child support assessments can be varied in certain situations to show changed circumstances such as a change in income, the birth of a new child or changed care arrangements. Parents/carers with a child support assessment need to tell the CSA of changes in circumstances such as a new address, income or changed care arrangements as soon as these events occur as the CSA cannot back-date assessments to reflect these changed circumstances.

An application can also be made to the CSA to ask for the child support assessment to be changed due to special circumstances. This could take into account:

- the high costs of spending time with your child (for example if the parents live a long way apart);
- caring for your child (for example if they need braces on their teeth or have a disability with high out-of-pocket expenses);
- educating your child (for example if the parents have agreed they attend a non-government school); or
- the assessment does not properly reflect one or both parent's capacity to pay child support in some other way.

You should obtain some legal advice about this process before you start on it.

Parents/carers must read letters from the CSA carefully (or ask them to be explained) to find out about their obligations to inform the CSA.

What are child support agreements? Should I obtain legal advice?

Parents are able to enter agreements known as "child support agreements", which set out in writing the amount, frequency and method of payment of child support payments. They should not be entered into lightly and you should obtain independent legal advice before entering a child support agreement. Child support agreements can be "limited" or "binding". Only binding child support agreements require a lawyer to sign them, but you should always obtain legal advice before entering any sort of child support agreement.

If the parent/carer receiving the child support payments is receiving more than the minimum amount of Family Tax Benefit, Centrelink has rules that must also be taken into account when entering a child support agreement.

The CSA will not give me a child support assessment because I do not have proof that my ex-boyfriend is the father of my child.

What can I do?

The CSA will only issue a child support assessment to a person if the person can prove that the paying parent is a biological, adoptive parent of the child or a former same-sex partner (in certain circumstances). Acceptable proof includes the name of the parent on the child's birth certificate, showing the parents were married to each other at the time of the child's birth and completion of a statutory declaration by the paying parent acknowledging parentage of the child. If you cannot provide acceptable proof, you can take steps to change this. You may need to take court action and to have DNA testing done by an approved DNA testing laboratory. You may need the assistance of a lawyer from Legal Aid NSW, a community legal centre or a private lawyer. In some cases funds may be available from Legal Aid NSW to pay the fees of a private lawyer.

I have lost my job and cannot afford to pay child support.

What are my options?

Contact the CSA and find out what your options are. These will vary depending on your circumstances, but chances are that you will be able to pay less child support. The CSA can be contacted on 131 272 and their website can be found at www.csa.gov.au

The children live with my ex-partner who is in a new relationship.

Do I still have to pay child support?

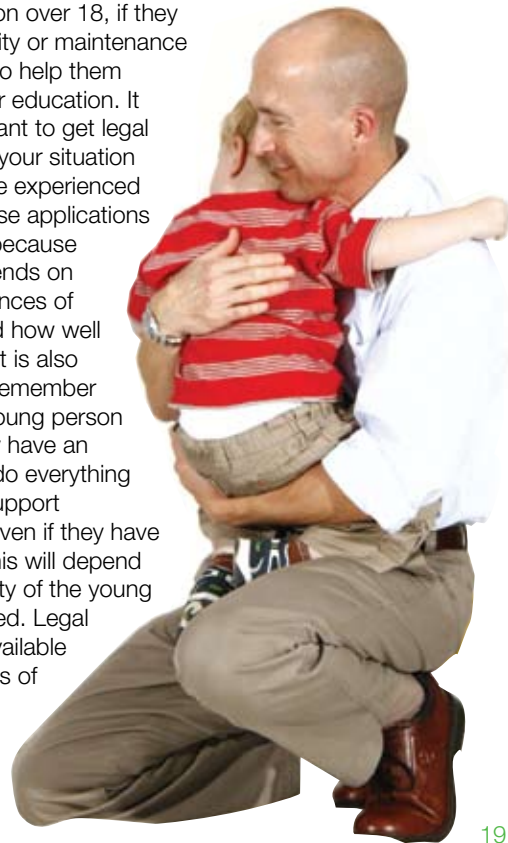
The parent who doesn't live full time with the children from the relationship has an obligation to financially support their children until they are at least 18 years of age. A new partner does not have a legal obligation to support another person's child.

I have a child support assessment. My child turns 18 this year and is still at school. Can I do anything?

If a child turns 18 during their last year of secondary school, the carer parent can ask the CSA to continue the child support assessment until the child completes the school year. This application must be made before the child turns 18, and only applies if the child is already in the last year of school. Therefore if your child is turning 18 and is still in their second last year at school, either a private agreement must be reached or the carer/parent or young person can make an application to the Court for an order under the *Family Law Act*.

My child has a disability and has turned 18. Can I still get financial support from my child's other parent?

It is possible to make an application under the *Family Law Act* for maintenance for a young person over 18, if they have a disability or maintenance is necessary to help them complete their education. It is very important to get legal advice about your situation in making these applications to the Court because success depends on the circumstances of your case and how well you prepare. It is also important to remember that once a young person turns 18, they have an obligation to do everything they can to support themselves, even if they have a disability. This will depend on the capacity of the young person involved. Legal aid may be available for these types of cases.



Who to contact

Legal help

Legal Aid NSW

Family law advice is free from all our offices. Contact your nearest Legal Aid office or visit www.legalaid.nsw.gov.au

Legal Aid NSW Child Support Service

This is a specialist legal service with lawyers experienced in child support and over 18 maintenance cases. An extensive outreach service is provided across NSW. Phone 02 9633 9916 to make an appointment in Sydney or 1800 451 784 to make an appointment in regional NSW.

LawAccess NSW

Tel: 1300 888 529 or TTY 1300 889 529:
A telephone service which provides legal information, referral and in some cases legal advice.

Community Legal Centres NSW

9212 7333 www.nswclc.org.au

Law Society of NSW Community Referral Service

9926 0300 or call LawAccess on 1300 888 529 for information and referral to private lawyers.

Women's Legal Centre

9749 5533 or 1800 801 501 (country areas toll free).
Indigenous Women's Program
1800 639 784 (toll free).

Wurringa Baiya Aboriginal Women's Legal Service

9569 3847 or 1800 686 587
www.wurringabaiya.org.au

Help with domestic violence

Domestic Violence Advocacy Service

8745 6999 and toll free 1800 810 784.

DoCS Domestic Violence Line

1800 656 463 24 hours 7 days.

Courts

Family Courts of Australia

1300 352 000
www.familylawcourts.gov.au www.familycourt.gov.au
The Family Law Courts share their registry and telephone information services.



Who to contact

Mediation and counselling

Legal Aid NSW Family Dispute Resolution Service

Legal Aid's mediation service for clients who have been granted legal aid. This service can be reached on 9219 5000, 9219 5118 and 9219 5119

Family Relationship Centres and Family Relationship advice line

1800 050 321 www.familyrelationships.gov.au

CatholicCare

9390 5366 www.catholiccare.org

Community Justice Centres

1800 990 777 www.cjc.nsw.gov.au

Relationships Australia Mediation Service

1300 364 277 www.relationships.com.au

Unifam

8830 0777 www.unifamcounselling.org

Interrelate Family Centres

1300 736 966 www.interrelate.org.au

Other contact points

Centrelink Free call (customer relations)

1800 050 004

Child Support Agency

Free call 131 272

Federal Police

6223 3000

DoCS Helpline

132 111

NSW Registry of Births, Deaths and Marriages

1300 655 236 (local call)

Translating and Interpreting Service

Provides free interpreters if you do not speak English. TIS can help you talk to services in your language. Call TIS on 131 450.



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